92-1971

No. _____

Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
1993 TERM
JACKIE MOORE, INDIVIDUALLY AND AS THE OPERATOR OF JOPLIN REGIONAL STOCKYARDS; and JOPLIN REGIONAL STOCKYARDS, INC., a Missouri Corporation,
PETITIONERS,
v.
EDWARD MADIGAN SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND THE UNITED STATES,
RESPONDENTS,
ON PETITION FOR WRIT OF CERTIORARI TO THE 8TH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the USDA may promulgate a regulation which provides that thereafter it can adopt regulations without following the notice and comment requirements of 5 U.S.C. 553.

2. Whether, while disregarding the "notice and comment" requirements of 5 U.S.C. 553, the USDA can adopt new rules of practice which deviate from the "Uniform" Rules of Practice Governing Adjudicatory Proceedings which had previously been promulgated pursuant to 5 U.S.C 553 by the USDA.

3. Whether under the law the USDA has the authority to deprive the Petitioners of the use of their property where the USDA found that independent third parties committed violations.

PARTIES

PETITIONERS: Jackie Moore;
Joplin Regional Stockyards, Inc.
(There is no parent company or subsidiary to be listed under Rule 29.)

RESPONDENTS:

The Secretary of the United States Department of Agriculture;
The United States.

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OPINIONS

The April 1, 1993, opinion of the Court of Appeals for the 8th Circuit, whose judgment is herein sought to be reviewed, is reported at 1993 WL 92430, and is reprinted in the appendix to this Petition beginning at page 1. The prior opinion of the United States District Court for the District of Missouri, Western Division, also reprinted in the appendix at page 15, is reported at 789 F. Supp. 1479 (W.D. Mo. 1992). The decision of the United States Department of Agriculture, decided on December 10, 1990, which was not published, is found in the appendix at page 34.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1993. Rehearing was denied on May 5, 1993. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1254, and 5 U.S.C. 702-704. The jurisdiction of the Court of Appeals and the U.S. District Court was based on 5 U.S.C. 702-704, 28 U.S.C. 1331, 28 U.S.C. 2201, and 28 U.S.C. 1361.

CONSTITUTIONAL AND STATUTORY PROVISIONS

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

(1) A military or foreign affairs function of the United States; or

(2) A matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) A statement of the time, place, and nature of public rule making proceedings;

(2) Reference to the legal authority under which the rule is proposed; and

(3) Either the terms or the substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute,

this subsection does not apply -

(A) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) When the agency for good cause finds, and incorporates the finding and a brief statement of reasons therefore in the rules issued that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by the section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rules shall be made not less than 30 days before its effective date, except -

(1) A substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) Interpretative rules and statements of policy; or

(3) As otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person a right to petition for the issuance, amendment or repeal of a rule.

5 U.S.C § 558. Imposition of Sanctions; Determination of

Applications for Licenses; Suspension, Revocation, and Expiration of Licenses.

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

CATTLE CONTAGIOUS DISEASES ACT

21 U.S.C. § 111. Regulations to Prevent Contagious

Diseases.

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one state or territory of the United States or the District Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one state or territory or the District of Columbia in transit to another state of territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

21 U.S.C § 122. Offenses; Penalties.

Any person, company, or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than $100.00 nor more than $5,000.00, or by imprisonment not more than 1 year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than $1,000.00. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such orders shall be treated as a final order reviewable under Chapter 158 of Title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

STATEMENT OF THE CASE

The Petitioners request that the Court issue its writ to the 8th Circuit Court of Appeals. Petitioners seek relief from a decision of the United States Department of Agriculture (USDA) which ordered a suspension of the specifically approved stockyard status (SASS) of the Petitioners. The 8th Circuit upheld part of the USDA decision and failed to grant Petitioners the relief requested. Federal court jurisdiction was based on 5 U.S.C. 702-704, 28 U.S.C. 1331, 28 U.S.C. 2201 and 28 U.S.C. 1361.

PROCEDURAL HISTORY

Jackie Moore and family purchased the stockyards at Joplin, Missouri, in late 1986. His family owns the corporation referred to as Joplin Regional Stockyards, Inc. There had been a stockyard operated by others on the grounds prior to this. After Petitioners began their operation, four livestock commission companies thereafter handled livestock transactions at the stockyards. One of those commission companies is owned by Petitioners. The other three commission companies are independent third parties who lease space from the Petitioners.

For many years the USDA has been engaged in a brucellosis program in cooperation with the states. At the time at issue the incidence of brucellosis in cattle in Missouri was less than 1/4 of 1 percent. The USDA contends that the Petitioners must have a license (SASS) granted by the USDA to handle "test eligible" livestock in interstate commerce. "Test eligible" cattle are those that are capable of breeding, with exceptions based on age.

The USDA requires that a "stockyard operator" execute an agreement with the USDA. Moore executed the agreement on forms provided to him by the USDA in February 1987.

Improvements were made in sanitation and in the identification of livestock after Petitioners purchased the facility. On October 13, 1988, in a periodic report (the 1988 report), a government inspector indicated that the stockyards did not have a satisfactory overall evaluation, but wrote that improvements had been made and noted that the "old facility (was) being rebuilt." The USDA contends that there were two types of problems at the yards: 1.) sanitation, and 2.) maintenance of identity of cattle. The USDA contends that in May 1989 a USDA inspector (who did not testify at the USDA hearing) found that the stockyard was not in compliance.

The USDA had promulgated a regulation in 1986 which stated that stockyard operators must sign an agreement to have SASS status and that if the USDA sought to revoke the SASS of a stockyard operator it would have a hearing "in accordance with rules of practice which shall be adopted for the proceeding." 9 C.F.R. 78.44. In September 1989, the USDA determined to seek revocation of the Moore's SASS. On about September 15, 1989, the USDA adopted "rules of practice" to be applied in this particular hearing. The USDA did not follow the notice and comment requirement set out in 5 U.S.C. 553. The USDA did not publish these new rules. There was no opportunity for comment. On about September 15, 1988, the USDA simply prepared rules of practice for this proceeding against Moore. (For brevity, these rules will hereafter be referred to as the unpublished

rules.)

On about September 15, 1989, the USDA sent to Jackie Moore 1.) a letter of charges and 2.) a copy of these unpublished rules of practice.

Jackie Moore obtained counsel and contested the charges. Moore's counsel determined that the USDA had "uniform" rules of practice which had been published which counsel believed should apply to the suspension proceeding instead of the unpublished rules. Those "uniform" rules of practice were found at 7 C.F.R. 1.130 et seq. Among other things, the uniform rules of practice of the USDA provide that the accused is entitled to a hearing in front of an Administrative Law Judge, sets out requirements for the use of agency reports, sets out a process for appeal, and makes provisions for subpoenas and discovery.

MOORE RAISED THE ISSUE. Moore first raised the issue of use of the unpublished rules during a pre-hearing conference held with hearing officer Frank Tang on or about May 29, 1990. The hearing officer was an attorney employed by the Animal and Plant Health Inspection Service (APHIS) of the USDA, which was the same branch of the USDA which was prosecuting the charges. The USDA had picked Mr. Tang to be the hearing officer. Tang was not an ALJ.

After the pretrial conference the hearing officer wrote as follows in a pretrial memo:

> In reviewing the rules of practice that have been adopted for the hearing, it has been determined that the hearing officer does not have subpoena power.

Prior to the USDA hearing, Moore filed written objections which stated in pertinent part:

Respondent (Moore) is confronted with what apparently has been styled as some kind of "informal" hearing in which (USDA) would seek to withdraw the "approved stockyard status"... (Moore) has heretofore, by telephone conference, inquired as to the type of proceeding. Among other things, (Moore) has been advised that the hearing officer does not have the power to issue subpoenas. By this written objection (Moore) would elaborate on the concerns that it (sic) has expressed with the hearing officer and counsel for APHIS (The Animal and Plant Health Inspection Service of the USDA).

The first question asks for the source of authority of APHIS to act and the source of the authority of the type of hearing being held. (Moore) has reviewed Title 21 of the U.S. Code and can find no authority for the action being taken or the type of hearing being held...

There is also no authority for the type of hearing being used by the USDA in the present case. The USDA must comply with its own regulations. The regulations found at 7 C.F.R. 1.130 are entitled "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes." Section 1.131 states that the rules of practice in this sub-

part shall be applicable to all adjudicatory proceedings under the following statutory sections, among others: The Animal Industry Act, 21 U.S.C. 117, the Cattle Contagious Diseases Act, 21 U.S.C. 122, the Statutory Provisions found at 21 U.S.C. § 127, and other adjudicatory proceedings... The importance of determining whether the rules of practice apply is, inter alia, that an Administrative Law Judge must be assigned to hear the case and the Jencks Act is applied by virtue of the regulations.

If this action is an adjudicatory proceeding this action should be dismissed for failure to follow the published rules of practice or at least stayed until the USDA complies with the rules of practice. If this action is not an adjudicatory proceeding then (Moore) requests that he be informed of the authority under which this action is brought.

Additionally, if this is an adjudicatory action the provisions of the Administrative Procedure Act governing adjudications must be applied.

***

Section 558 of 5 U.S.C. states that "a sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."*** It is

> submitted that the USDA does not have the authority to take the present action.
> WHEREFORE, 1.) (Moore) objects to the assertion of jurisdiction, 2.) (Moore) objects to the type of hearing employed, and 3.) (Moore) objects to the failure of the USDA to apply the rules of practice.
> (Appellants' appendix before the 8th Circuit, pages 17-20.)

This matter was argued on the record prior to the agency hearing (Tr. 5). Moore argued that the Uniform Rules of Practice published at 7 C.F.R. 1.131 should be applied instead of the unpublished rules. The USDA argued that they were proceeding under 21 U.S.C. § 111 and that it was broad enough for the USDA to proceed in this manner. The USDA also stated on the record that its employee, the hearing officer, should not decide this matter, but rather that the matter should be left for the federal courts to decide.[1] Counsel for the USDA made the following statement to the hearing examiner:

> A Deputy Administrator has appointed you, believed anything regarding jurisdiction or your authority would be an appellate review in a district court, and I don't believe you should get to that issue at this point in time (sic). (Appellants' Appendix before the 8th Circuit, pages 22-24.)

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[1] Both the District Court and the Appeals Court also declined to address the issue by claiming that the matter should have been raised before the agency. They failed to note that the issue was raised before the agency.

The hearing examiner then off the record indicated that he would not rule on the objection, and he began the hearing.

After the hearing, during briefing before the hearing examiner, Moore filed a further statement regarding these objections, stating:

> At the hearing (Moore) filed a written objection to the jurisdiction of the USDA to take the proposed action and an objection as to the type of hearing being held...By not following the published rules of practice and instead using informal rules, the USDA has violated the Administrative Procedure Act. (Appellants' Appendix before the 8th Circuit, at pages 65-66.)

The hearing examiner paid no heed to these objections and thereafter issued recommended findings of fact and conclusions of law adverse to Petitioners, which were adopted by the USDA on December 10, 1990 along with an order for a five year suspension. Petitioner Moore then filed suit with the District Court. The corporation, Joplin Regional Stockyards, Inc., joined in this action. Petitioners again argued that the USDA should not be allowed to use these unpublished rules of practice and instead should have been required to comply with the Uniform Rules of Practice which had been properly promulgated through notice and comment (7 C.F.R. 1.130). The District Court ruled against the Petitioners. The Court declared that the Petitioners should have raised the issues below, failing to note that Petitioners had raised the issues before the USDA hearing.

The matter was then appealed by Petitioners to the 8th Circuit Court of Appeals. The 8th Circuit ruled against

Petitioners, and declined to rule on this issue by stating (incorrectly, we believe) that Petitioners failed to raise the argument regarding the rules of practice prior to the time the USDA reached a final decision.

OTHER FACTS

Government inspectors allegedly found incidents of non-compliance. Two inspection reports were presented at the USDA hearing. The first one was dated October 1988. It was signed by Dr. Charles Dake. Dake testified in person. The individual that allegedly issued the second report did not testify in person; his report was apparently accepted by the hearing officer under section 7 (h)(iv) of the unpublished rules of practice. Dr. Dake provided an affidavit after the USDA hearing which was presented to the District Court by the USDA. In the affidavit Dake stated that he rechecked the stockyards two weeks after the October 1988 report and found that all "deficiencies" were brought into compliance.

At the USDA hearing Dake testified that he had been present at the stockyards numerous times during the period at issue and he saw no violations of the brucellosis laws by the Petitioners; he did not think the stockyards were unfit for brucellosis testing in 1988; and that it was the duty of the State Deputy Veterinarian (Dr. Short) to identify animals coming into the market. (This was important because the USDA disregarded Dake and concluded that it was the duty of Moore to identify animals coming into the stockyards, even when independent third parties were handling the transactions.)

Walter Jones, who was employed by the USDA at all times relevant for the purpose of supervising the identification of animals at the stockyards, stated in an affidavit that was

obtained after the USDA hearing that the condition of the stockyards at the relevant times was average for stockyards in Missouri; that Petitioners had made great improvements to the facilities; that improvements were made in the identification of livestock and in sanitation; and that whenever he brought something to the attention of Moore, Petitioners took action to remedy the situation.

At the USDA hearing an inspection report from Dr. Gerald McKee was presented. This report indicated that when he inspected the stockyards in October 1989 the facility was in an "excellent" state of cleanliness and sanitation. The evidence tended to show that the condition of the stockyards went from average to excellent during the first few years that Petitioners owned the facilities.

No evidence was presented of any incidence of the disease of brucellosis being present in, or spread by, cattle that went through the stockyards. Former State Epidemiologist Dr. James Badger testified that the infection rate in that area of Missouri was minimal.

The hearing examiner, the District Court Judge, and the 8th Circuit all stated that there were improvements on the part of the Petitioners.

After commending Petitioners, the USDA issued a 5 year suspension. The courts ruled that any suspension over 6 months could not be supportable.

While obviously finding at least part of the USDA decision arbitrary, the courts declined Petitioners' request that the decision be set aside or reopened.

One of the questions in this case was whether the Petitioners were responsible for the alleged violations. The "identity" violations were cases where a seller delivered

livestock to the stockyards and the seller's address was written down as being in Missouri, when the USDA later concluded by tracing the serial numbers on ear tags that the animals had been reported as being in another state at certain times not too long before the sale. Only two "identity" violations occurred after the October 1988 report, and they were both transactions handled by an independent third party.

The evidence presented by the USDA was that the Petitioners were involved in no identification violations after the first report. Petitioners contended that after they were given such warning they brought themselves into compliance, and this is shown by an absence of transactions thereafter. The Petitioners also contend that it was Dr. Short who was responsible for identification, and he, instead of Petitioners, should have policed the third parties. The 8th Circuit decision held that the USDA did not err in holding Petitioners responsible for the two post-warning violations which were committed by someone else. The 8th Circuit concluded that Petitioners had the authority to stop misidentification by those who rented space at the stockyards and that Petitioners failed to correct the actions taken by independent third parties. The actions taken by Petitioners to try to stop such activities was rejected by the 8th Circuit as being insufficient.

Petitioners contended that they did what they could, but had not been told they were supposed to police third parties and had little control. The lack of control was demonstrated by the conduct of the State Deputy Veterinarian, Dr. Steven Short. Short was Deputy State Veterinarian in charge of the identification and testing program at the stockyards until March 1989. Short was not an employee of Petitioners. Short was the government agent who was stationed at the stockyards

who had the job of blood-testing and identifying the animals that were being sold by the commission companies. His tenure at the stockyards covered the time span that included all of the alleged identification violations that were presented by the USDA at the hearing. Short had a troubled history. He admitted he had been regularly impaired on cocaine while he was supposed to be performing his duties as a state deputy. Jackie Moore had contacted Missouri and tried to get the State to replace Short, but the Missouri State Veterinarian refused. Finally, after Dr. Short became a resident at a drug rehabilitation center, the State of Missouri listened to the Petitioners' pleas and replaced him. The USDA could not show any incidents of identification violations occurring after Dr. Short was replaced.

Petitioners presented evidence of their good faith. They had previously told State employees that if there was ever a problem to bring it to their attention and it would be rectified. Petitioners placed signs at the stockyards which told sellers that the stockyards must absolutely have the complete and accurate address of the owner who sells livestock. Petitioners expended time and money to improve the facility. Dr. Short in a sworn statement told state and government investigators that Moore was trying to do everything on the "up and up." After Dr. Short became aware that the Petitioners were trying to get the state to fire him he stated to investigators that if he were fired he would guarantee that the stockyards would have many "illegalities." The evidence showed improvements on the part of Petitioners while the government was hindering Petitioners' efforts.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE IN ALLOWING THE USDA TO USE THE INFORMAL RULES OF PRACTICE THAT WERE ADOPTED WITHOUT NOTICE AND OPPORTUNITY FOR COMMENT THE 8TH CIRCUIT FAILED TO FOLLOW THE LAW AND THE DECISION OF THE 8TH CIRCUIT RESULTS IN CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS.

The present case involves questions that the Supreme Court should decide. Can an agency adopt rules of practice that govern actions against individuals without adherence to the notice and comment procedures of 5 U.S.C. 553? Some courts have held that rules of practice governing adjudications or procedural rules that affect rights of individuals must comply with the notice and comment procedure of 5 U.S.C. 553. Other courts have indicated that notice and comment is needed when the rules of practice deviate from previous rules.

The 8th Circuit has not followed those courts. The 8th Circuit by the present decision allows federal agencies to adopt new rules of practice without notice and comment, even when the new rules deviate from the norm. As a result of this decision there is conflict among the circuits.

The Supreme Court should decide this issue because the conflict among the courts leads to confusion and because the issue is important. As more authority is turned over to federal agencies, isn't notice and comment one of the few safeguards that we have? (After all, as now-Justice Scalia noted in 1978, procedure can be used by agencies to expand

power. See 1978 Supreme Court Review [University of Chicago] 345, at 405.) Should rules of practice that affect the rights of individuals in adjudications always be subject to notice and comment? Should there be a bright-line test under which rules of practice never have to comply with notice and comment? Should there be a test under which rules of practice sometimes are and sometimes are not subject to notice and comment?

Congress seemed to take the view that rules of practice utilized by administrative agencies in adjudications are important. In 1946 the House Committee on the Judiciary explained that the Administrative Procedure Act was an outline of "minimum essential rights and procedures" to be followed by the federal administrative agencies. Congress said the agencies could thereafter fill in the details, so long as they publish them. USCCS, 79th Congress (1946) at pages 1195, 1205.

The APA requires in section 552 that:

> Each agency shall make available to the public information as follows:...
> (C) Rules of Procedure...

It seems Congress wanted rules of procedure to be published so that everyone could determine what the rules are. In the present case the first that anyone knew of the unpublished rules was when Jackie Moore opened the envelope that contained notice of the charges, and saw a copy of the unpublished rules which had specifically been "adopted" for him.

An agency does not "publish" its rules by merely sending

a copy to the accused. In order to publish rules, there must be notice that is calculated to be available to the public. In the present case the USDA failed in its obligation to publish the rules.

Even if the USDA had published the rules, that would not be enough. Congress also required the opportunity for public participation when 5 U.S.C. 553 applies.

Section 553 of the APA provides that notice and comment rule making procedures shall be followed when rules are promulgated by the agency. There are exemptions. While "rules of agency organization, procedure, or practice" are exempt, rules of practice governing adjudications should not be exempt, according to cases such as Air Transport Association of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), vacated 111 S.Ct. 944, remand, 933 F.2d 1043.

Even if the USDA could argue that the "rules of practice" in the present case are exempt, the USDA has indicated that notice and comment should be the norm for rules of practice, that rules of practice should be uniform, and that the USDA should apply the exemptions of 5 U.S.C. 553 narrowly.

In 1971 the USDA announced that it was adopting a recommendation of the Administrative Conference of the United States, which eliminated the exemption provided by section 553(a)(2). While the elimination of that exemption will only directly apply in the present case if the court determines that the case involves benefits or contracts, the same pronouncement went on to say that the USDA would use the "good cause" exemption of 5 U.S.C. 553 sparingly. F.R., Volume 36, number 143, July 24, 1971, at page 13801.

The USDA in the past has followed the notice and comment procedure for other rules of practice. The USDA announced a proposal to adopt Uniform Rules of Practice Governing Formal Adjudicatory Administrative Proceedings on June 16, 1976, at F.R. Volume 41, number 117, at page 24385. These rules were adopted. The USDA stated that these Uniform Rules were to replace separate rules governing proceedings under the various statutes and regulations administered by the USDA. The USDA implied that the uniform rules were to be uniformly applied. F.R. volume 42, number 2, January 4, 1977, at page 743. In 1983 the USDA amended the Uniform Rules Of Practice so that they specifically applied to actions brought under Section 3 of the Cattle Contagious Diseases Act of 1903 (21 U.S.C. § 122).

Referring to the Uniform Rules of Practice, the Judicial Officer of the USDA stated as follows:

> These Uniform Rules of Practice, which are applicable to all of the departments' adjudicatory proceedings subject to the Administrative Procedure Act, were, in fact, issued after notice and comment public rule making... (In re David Harris, P.Q. Docket No.: 91-27, decided on May 1, 1991.)

While the Judicial Officer of the USDA was proclaiming that the Uniform Rules were uniformly applicable to all adjudications, his department failed to tell him that it had opted out of the Uniform Rules and used unpublished rules in the present action.

It certainly appears by the foregoing that the Uniform Rules of Practice should have been applied to the present

action. When Moore objected prior to the USDA hearing, he stated that the USDA was required to use the published Uniform Rules rather than the unpublished rules. The USDA responded by stating that they were acting under the authority of 21 U.S.C. § 111 in promulgating the rules. The USDA's argument is that it can make up whatever rules of practice it wants without notice and comment for this proceeding. The USDA's argument is that while it is required to apply the Uniform Rules if it brings an action under section 3 of the Cattle Contagious Diseases Act (21 U.S.C. § 122), it decided to bring this action instead under section 2 of that Act (21 U.S.C. § 111). The USDA fails to note that the section it alludes to (21 U.S.C. § 111) does not refer to any actions against persons for violations of the regulations. It is section 3 of the Act (21 U.S.C. § 122) which authorizes the USDA to take action against individuals for violations of the Act. Accordingly, it appears that the Uniform Rules of Practice should have been applied due to the requirement in 21 U.S.C. § 122 that an accused was entitled to a hearing on the record, and the language of 7 C.F.R. 1.131, which states that the Uniform Rules shall be applicable in such actions under the Cattle Contagious Diseases Act.

A review of the Cattle Contagious Diseases Act and its amendments makes it clear that it was the intent of Congress that an accused would be entitled to a hearing on the record. Such a hearing on the record certainly entitles the accused to use of the Uniform Rules of Practice, even if there were not a specific requirement of such in 7 C.F.R. 1.131. Review of 21 U.S.C. 117(b), 122, 127, 134e, and 135(b) shows that every time Congress gave the USDA the authority to penalize someone under the Cattle Contagious Diseases Act or related

animal health acts, Congress made it clear that the accused would be entitled to a hearing on the record.

The USDA's argument is that there is nothing that specifically says it cannot do what it did.

The USDA is clearly required to apply the Uniform Rules and give the Petitioners an ALJ if the USDA seeks even a $25 fine from Petitioners for violations of the animal health regulations. See 21 U.S.C. 122 and 7 C.F.R. 1.131. Likewise, if the USDA under sections 117(b), 127, 134e, or 135 of 21 U.S.C. seeks a penalty from the Petitioners for violations of the animal health laws, the Petitioners must be given an ALJ and the Uniform Rules must apply. However, the USDA argues that its power in the present case comes not from the sections which authorize it to punish people but from section 111, which authorizes it to prevent the spread of disease. Accordingly, says the USDA, it can ignore the punishment sections and proceed to make up new rules of practice under authority of section 111.

The USDA's view should not be accepted. From reading the APA, the animal health acts and the regulations as a whole the Court should conclude that the Uniform Rules of Practice should have been applied instead of the unpublished rules.

Even if the court adopts the USDA's reasoning that it can do what is not specifically prohibited, the court should conclude that the use of the rules of practice chosen by the USDA was improper because these rules of practice were adopted by the USDA without notice and comment.

In explaining how it came up with these rules, the USDA explains that in 1986 it adopted via notice and comment a regulation which stated that thereafter in an action to

suspend SASS the USDA could adopt whatever rules of practice it may choose without going through the notice and comment route. In other words, the agency's explanation is that it announced that in the future it would not comply with notice and comment.

The regulation that the USDA refers to states:

> [T]he operator of the stockyard will be informed in writing of the reasons for the proposed withdrawal of approval and, upon request, shall be afforded an opportunity for a hearing with respects to the merits or validity of the action to withdraw approval if there is a dispute regarding any material fact, in accordance with rules of practice which shall be adopted for the proceeding. (9 C.F.R. § 78.44(b)(2).)

While a plain reading of the above leads one to believe that the "uniform" rules would be the rules adopted for the action, the USDA argues that it can adopt whatever rules it wants to make up, under authority of this regulation.

The rules of practice do affect the rights of the Petitioners. Petitioners were damaged by use of the unpublished rules. The Uniform Rules guarantee an Administrative Law Judge. ALJs have more independence than employees of the USDA. Moore had to present to the USDA employee his argument that another governmental agent was not acting up to standard and that the government's allegations were false. The pressure brought to bear by the USDA on the USDA employee is shown by the fact that when Moore objected to the rules used in the hearing, the USDA

attorney all but demanded that the USDA employee not rule on the objection. The USDA employee then accepted the unprecedented theory of the USDA that Moore was responsible for the actions of independent third parties. As the findings of the USDA employee have been accepted by the courts (except for the magnitude of the penalty) on the theory that the findings were not arbitrary, this shows the importance of having an impartial fact finder in the first instance. Petitioners were deprived of the use of subpoenas, which are provided by the Uniform Rules of Practice, and the testimony that they were unable to present at the USDA hearing would have been favorable to the Petitioners. This is shown by the later affidavit of Walt Jones, which was important testimony for Petitioners which they could not present at trial without subpoena power and discovery.

The 8th Circuit apparently takes the position that the Petitioners were required to show that they were prejudiced by the use of the unpublished rules and concludes Petitioners did not make this showing. This is contrary to prior decisions which have taken the position that if the agency does not follow its rules the action must be set aside, without requiring a showing of prejudice. Oglala Sioux v. Andrus, 603 F.2d 707 (8th Cir. 1979); Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989); Gulf States v. NLRB, 579 F. 2d 1298 (5th Cir. 1978). After all, because they had no discovery and subpoena power, Petitioners are not able to prove what testimony they could have presented if they had been able to compel testimony.

Unfortunately, the 8th Circuit has approved the action of the USDA. As a result, we should expect to see federal agencies announcing that whenever they want to bring an adjudicatory administrative action they will adopt whatever

rules of practice they want to apply to that particular proceeding at the time they decide to bring the action, without adhering to the notice and comment requirement of the APA. The decision of the 8th Circuit should not be allowed to stand.

The 8th Circuit decision is not only contrary to the statutes and regulations, it is in conflict with other circuits.

The leading case to discuss this matter is Air Transport Association of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), vacated 111 S.Ct. 944, remand, 933 F.2d 1043. That case dealt with rules of practice governing adjudicatory actions. The DOT promulgated the rules without notice and comment. The rules established a comprehensive adjudicatory scheme providing for notice, settlement procedures, discovery, a hearing before an ALJ, and administrative appeal. The D.C. Circuit stated that these rules were not exempt under 5 U.S.C. 553 because "they substantially affect a civil penalty defendant's right to an administrative adjudication." Supra, at p. 376. The D.C. Circuit defined the exemption for agency procedure as applying to internal agency procedure, that is, procedures that dealt with housekeeping matters and matters within the agency about which the public should not be too concerned. The court concluded that agency rules of practice that affect rights of individuals or the right of persons to avail themselves of adjudication were different than rules of agency procedure, and the public did have an interest in participating in rule-making in the former situation because it affected their rights. The court cited Chrysler Corp. v. Brown, 441 U.S. 281, 310, 99 S.Ct. 1705, 1721, 60 L.Ed.2d 208 (1979).

Other decisions also appear to be in conflict with the 8th Circuit and would support a conclusion that the USDA's

rules of practice were not exempt from 5 U.S.C. 553. In National Motor Freight Traffic Association v. U.S., 268 F. Supp. 90 (D.C. Cir. 1967), the ICC promulgated new procedures without notice and comment. The ICC stated that it intended to restore procedures which were formerly available to shippers before a particular court decision. Among other things, the procedures would permit a shipper to begin an action by sending a letter to the commission. This appears to be a "procedural" matter. When challenged, the ICC said that the new regulation merely provided a procedure for individuals to use. The ICC argued that it was exempt under 5 U.S.C. § 553. The D.C. Circuit stated that the characterizations "substantive" and "procedural" do not guide inexorably to the right result, nor do they advance the inquiry very far. Regardless of the label, said the court, the commission took a significant step in the implementation of a remedy when it instituted the procedure in question. The court concluded that the exemption under 553 was not applicable, and notice and comment was required. The regulation of the ICC was thereby set aside.

The United States Supreme Court appeared to touch on this issue in U.S. ex rel Accardi v. Shaughnessy, 74 S.Ct. 499 (1954). The Petitioner attacked the denial of his application for suspension of deportation. The Petitioner argued that the board had not complied with the requirements of the regulations. If a continuum lies between the labels of substantive and procedural, the regulation at issue in Accardi was close to procedural. The Supreme Court held that the failure of the board to follow its regulations was a denial of due process.

In Brown Express Inc. v. U.S., 607 F.2d 695 (5th Cir.

1979), the ICC promulgated without notice and comment a regulation which would eliminate the procedure whereby the ICC would notify competing carriers that an application has been filed for an area. It had been the practice for several years for the ICC to notify existing carriers that someone else was seeking a permit. The ICC argued that it did not have to comply with section 553 because it fit the exemption provided by section 553(b)(A) for agency procedure. The 5th Circuit disagreed, stating that the exemption did not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated. The present decision of the 8th Circuit is in conflict with the principles stated by the 5th Circuit in Brown Express.

Brown Express, National Motor Freight and Air Transport show that procedural rules are not exempt per se from 5 U.S.C. 553 and thereby are in conflict with the principles espoused in the 8th Circuit decision. Brown Express also raises another point in which there is a conflict with the 8th Circuit decision. In the present case, the USDA appeared to depart from the existing practice (Uniform Rules of Practice). In Brown Express, such deviation was set aside for failure to follow notice and comment. In the present case, the 8th Circuit upheld the action of the USDA.

There also is conflict with Ingram Barge Company v. U.S., 691 F. Supp. 474 (D.C. 1988), 884 F.2d 1400 (D.C. Cir. 1989), in which the court stated that the federal agency may not change the rules as the game progresses. This is in effect what the USDA did in the present case, as it adopted the rules of practice for this particular case simultaneously with drawing up the charges against Moore in September 1989. This was after the facts alleged in the charges had occurred.

The danger of allowing the agency to draw up ad hoc rules of practice without notice and comment is clear. If the agency does not want the ALJs, or any particular ALJ, to decide the case, it could simply draw up rules sending the case to a particular agency attorney, as the USDA did here. If an agency knows it cannot get a particular agent to the hearing, it could simply draw up rules that say the reports of that agent are admitted into evidence without authentication, as the USDA appeared to have done in this case. If the agency does not want the accused to be able to subpoena witnesses, it could just eliminate that in the rules.

In Committee for Fairness v. Kemp, 791 F. Supp. 888 (D.C. 1992), HUD promulgated a new method for calculating operating subsidies. The District Court held that HUD improperly failed to follow notice and comment procedures as required by the APA. The Court stated that exceptions to notice and comment are to be recognized only reluctantly, and that the exceptions do not extend to procedural rules that depart from existing practice and had a substantial impact on those regulated.

In National Association of Home Health Agencies v. Schweiker, 690 F.2d 932 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 1193, the agency issued a regulation which directed that free standing home health agencies shall begin using certain intermediaries for all medicare reimbursement determinations and payments. The regulation was issued without notice and comment. The government argued that the regulation was exempt as a rule of agency procedure. The court disagreed, stating that the exceptions provided in section 553 do not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated. The

court also stated that the exemption cannot apply where the agency action trenches on substantive rights and interests. The court held that the agency must comply with notice and comment.

Federal agencies through regulations tend to expand their power over people's livelihoods. That makes it all the more important that agencies comply with the statutory restrictions on that power, such as found in 5 U.S.C. 553.

II. CERTIORARI SHOULD BE GRANTED BECAUSE IN ALLOWING THE USDA TO SUSPEND MOORE THE 8TH CIRCUIT FAILED TO FOLLOW THE LAW AND THE DECISION OF THE 8TH CIRCUIT RESULTS IN CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS.

In accepting the USDA's conclusion which held Petitioners liable for the actions of others, the 8th Circuit had no support in the law. The resolution of this issue is important enough that the Supreme Court should address it.

The USDA was not authorized to penalize Petitioners for actions of others. A federal agency's power is no greater than that delegated by Congress. Lyng v. Payne, 106 S.Ct. 2333, 2341 (1986). Under 5 U.S.C. 558(b) the power of the agency to issue a sanction is limited to what has been authorized by law.

Congress did not authorize the USDA to suspend stockyards under the relevant statutes. Further, Congress did not authorize the USDA to suspend Petitioners for actions performed by independent third parties.

The Court of Appeals accepted the faulty reasoning of

the USDA by rationalizing that Petitioners had signed the agreement that the USDA had demanded that Moore sign, which stated that Moore was legally responsible as operator. Moore should be responsible as operator for his own operation, but there is no support for the notion that he was responsible for the operation of independent third parties. He was not the operator of the business of the third parties.

The 8th Circuit then reasoned that Petitioners could have done more to stop third parties from committing violations. To support this, the Court of Appeals stated that there was some "agreement" that the independent commission companies had executed with Moore which authorized Moore to evict them if they sold class B cattle as class A cattle. The Court was in error, as there was no such agreement executed by the independent commission companies.

The alleged transgressions of the independent third parties involved situations where their customers gave Missouri addresses to them and the independent third parties recorded in their records that the address was in Missouri. The state deputy veterinarian, Dr. Short, then presumably saw an eartag on the animal and wrote down the number. Sometime later the USDA was able to trace the eartag number and concluded that the animal had been in Oklahoma or Arkansas within a few days prior to the time the third party handled it at the stockyards at Joplin, but this search took several days. The USDA had never informed Petitioners that they should go into the offices of these independent third parties and demand to review their records to check on this. The USDA never demanded that Petitioners do something that even the government agents could not do at the time, that is, conduct an instantaneous search of the records of the states to see if an

eartag was reported as being in such other state and conclude that search before the day is over. (Government investigator Westrich admitted that a computer link would be needed and no one had such facilities.) The Petitioners were penalized for not doing what they probably could not have done. Further, Petitioners were penalized for not doing something although they had never been told to do it.

The USDA also made the incredible finding in its decision that Jackie Moore was responsible to police the actions of independent commission companies at the stockyards and the USDA was not responsible to do so. (This is contrary to the testimony of Dr. Dake that it was the responsibility of the Deputy State Veterinarian to determine identification of animals, as he had the job of inspecting the animals and writing down identification numbers.)

Vicarious liability for third parties is contrary to the norm, and should not be not applicable in the present case, absent some Congressional directive that deviates from the norm. Belsinger v. District of Columbia, 295 F.Supp. 159 (D.C. 1969); City of Webster Groves v. Erickson, 789 S.W.2d 824 (Mo.App. 1990); 3 CJS, Agency Section 426. There was no such directive.

The Court of Appeals decision is contrary to the 10th Circuit decision in Capitol Packing v. U.S., 350 F.2d 67 (10th Cir. 1965), which stated that no penalty should be issued by the USDA where there is a lack of a clear regulation issued prior to the time of the violation that the accused could be aware of. Petitioners were never warned that they should have demanded to inspect the books and records of third parties. Petitioners were never told that they were vicariously liable for actions of independent third parties.

The Court of Appeals decision is also contrary to U.S. v. Johnson, 35 F.2d 256 (D. Nev. 1929), where the court concluded that the only power conferred upon the USDA by Congress was for the making of regulations requiring an examination before cattle could be moved interstate from a location where a quarantine had been established or from a location where the USDA believed there was disease. In the present case there was no showing that any animals were not tested or that any animals had the disease of brucellosis.

The 8th Circuit decision appears to also be contrary to U.S. v. Hoover, 133 F.950 (D. Neb. 1904), where the court held that the USDA had no jurisdiction over animals that were not affected with, or exposed to, infectious disease.

The power asserted by the USDA to suspend operations and deprive people of the use of their property is not supported by the statutes. Congress addressed the question of what the USDA could do when people violate the animal health regulations. Congress said in 21 U.S.C. 122 that any person violating the regulations may be assessed a civil penalty of not more than $1,000, after notice and a hearing. This directive did not authorize a suspension. (A suspension of 6 months for a major stockyard operation such as Petitioners' is many times more serious than a $1,000.00 fine.) In 21 U.S.C. 127 Congress specified that for violations of the animal health laws involving inspection, handling, certification and movement of animals the USDA could after hearing assess a civil penalty of not more than $1,000. In 21 U.S.C. 134e Congress directed that the USDA could assess a civil penalty of not more than $1,000 after a hearing for knowing violations of certain animal health regulations. No suspension power was included in these grants from Congress.

The USDA contends that if Congress did not bar it from depriving people of their property, it can do so. The law is, or should be, that the USDA cannot deprive someone of the use of their property unless authorized by Congress.

CONCLUSION

Petitioners pray that the Supreme Court issue its writ of certiorari to the 8th Circuit.

June 1993.

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APPENDIX

Court of Appeals decision. 1

District Court decision 15

USDA decision 34

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-227

JACKIE MOORE, individually and as the operator of Joplin Regional Stockyards; JOPLIN REGIONAL STOCKYARDS, INC., a Missouri Corporation,	* On Appeal * from the * United States * District Court * for * the Western * District of * Missouri.
Plaintiff - Appellants, v.	
EDWARD MADIGAN, Secretary of the United States Department of Agriculture, and the United States,	
Defendants - Appellees.	

Submitted: January 13, 1993
Filed: April 1, 1993

Before MORRIS SHEPPARD ARNOLD, Circuit Judge, FLOYD R. GIBSON and REAVLEY,* Senior Circuit Judges.

REAVLEY, Circuit Judge.

*The HONORABLE THOMAS M. REAVLEY, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

The Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA) suspended the "specifically-approved stockyard status" (SASS) of Joplin Regional Stockyards, Inc. (JRS). USDA reached its decision after conducting an informal hearing at which a hearing officer found that various people repeatedly violated USDA's brucellosis regulations on JRS's premises. JRS and its legally-responsible operator, Jackie Moore, sued USDA for declaratory and injunctive relief. On cross-motions for summary judgment, the district court held that USDA's governing statute and regulations permitted the informal hearing procedure that USDA adopted for this case and that USDA accorded Moore a presanction opportunity to correct violations. But the court also held that the facts of this case did not justify the penalty selected by USDA, and accordingly reduced JRS's suspension period from five years to six months. Only Moore appeals. We affirm.

I. BACKGROUND

Moore and his family formed JRS in 1986, and JRS purchased Missouri real estate that had long been used as a stockyard (the stockyard). JRS earns money for each animal traded at the stockyard. Four livestock commission companies broker sales at the stockyard for additional fees, but only Joplin Livestock Commission Company (JLCC) is owned by Moore and his family. The three other companies lease space from JRS.

JRS can facilitate trade in Missouri cattle without federal permission. But to attract trade in out-of-state animals, JRS must secure SASS from USDA. See 9 C.F.R. §§ 78.5, 78.9-.12. USDA grants SASS to stockyards that agree to participate in USDA's program to eradicate

brucellosis. Brucellosis is an infectious disease that inhibits both procreation and milk production in cattle. USDA classifies states according to the incidence of brucellosis that USDA detects in each state. This case concerns activities during 1988 and 1989, when USDA classified Missouri as an "A" state and Oklahoma as a "B" state.

To combat brucellosis, USDA requires stockyard operators to 1) maintain sanitary conditions and 2) identify and separate cattle according to the brucellosis classification of the state from which the cattle arrive for sale.[1] USDA only grants SASS to stockyards that designate an individual as "operator" to be legally responsible for the fulfillment of these requirements. See Id. § 78.44. Jackie moore executed a SASS agreement (the Agreement) with USDA in February 1987.

On October 13, 1988, Dr. Charles Dake, a district veterinarian for the Missouri Department of Agriculture who USDA charged with inspecting stockyards for compliance with USDA regulations, found that the stockyard did not meet USDA sanitation requirements and that "numerous Oklahoma [class B] cattle shipments have been run through this market as class A animals." Dake warned in his report that "this is a serious problem which is a direct challenge to Missouri's class A status," and delivered this report to Raymond McDowell, a JRS manager. On at least three occasions before this adverse inspection report, JLCC sold

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[1]USDA veterinarian James Massman testified that an animal's domicile for purposes of brucellosis classification is determined by the state where the animal last spent 120 days.

class B Oklahoma cattle as class A Missouri animals. Dr. Stephen Short, who tested animals for brucellosis at the stockyards, testified that class A animals usually bring a higher price than class B animals.

On May 18, 1989, USDA inspector Walter Waddell toured the stockyards and again found sanitation and identification violations. In September 1989, USDA sent Moore a letter alleging the sanitation and identification infractions as breaches of the Agreement and proposing to withdraw the stockyard's SASS. Moore denied the allegations and requested a hearing. USDA provided an informal hearing, which Moore challenged as inadequate under USDA regulations.

After considering testimony and exhibits from Moore and USDA, a USDA hearing officer found that Moore breached the Agreement because 1) the stockyards did not meet USDA's sanitation standards and 2) on ten occasions (eight before October 13, 1988 and two more before May 18, 1989), class B cattle were sold as class A animals at the stockyard. A USDA deputy administrator recited these findings and ordered that SASS be removed from JRS and affiliated individuals and companies for five years. Moore and JRS exercised their statutory right to sue USDA for declaratory and injunctive relief from this order, see 5 U.S.C. §§ 702-03, and USDA stayed its order pending outcome of this litigation.

On cross-motions for summary judgment, the district court held, inter alia, that 1) the informal hearing granted Moore by USDA did not contravene USDA's governing statute or regulations and 2) USDA accorded Moore any required opportunity to correct infractions at the stockyard

before suffering a SASS suspension. Moore v. Madigan, 789 F. Supp. 1479, 1485 (W.D. Mo. 1992). While the court upheld USDA's decision that Moore violated the Agreement, the court found that USDA's penalty us "unduly harsh" and reduced the SASS suspension from five years to six months. Id. at 1488.

II. ANALYSIS

Only Moore appeals, so we do not reach the propriety of the district court's penalty reduction. Only some of the many issues that Moore raises on appeal merit explicit discussion.

A. FACT-FINDING PROCEDURE

USDA advised Moore in a September 1989 letter that it planned to withdraw SASS from JRS, and that Moore could request an informal hearing if he disputed the factual basis for the withdrawal. With USDA's letter, Moore received rules that USDA adopted to govern the informal hearing procedure. Moore claims that he was entitled to a formal hearing before an administrative law judge, with a panoply of discovery and subpoena rights.

First, Moore argues that congress accorded him a formal hearing. But when Congress mandates a formal hearing before an agency in a statute, it either employs the term of art "on the record" or it indicates its intent to trigger the formal hearing procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et. seq. See City of West Chicago, Ill. v. United States Nuclear Regulatory Comm'n, 701 F.2d 632, 641 (7th Cir. 1983); Webster Groves Trust Co. v. Saxon, 370 F. 2d 381, 384-386 (8th Cir. 1966). USDA claims authority to establish its brucellosis eradication program under 21 U.S.C. § 111, which permits USDA to

"make such regulations and take such measures as [the Secretary of Agriculture] may deem proper to prevent the introduction or dissemination of the contagion or any ... communicable disease of animals ...." No statute refers to SASS or agreements with stockyard operators, let alone withdrawal proceedings; these are creatures of regulations that USDA promulgated pursuant to section 111. There being no evidence of congressional intent to provide a formal hearing for the withdrawal of SASS, the district court correctly dismissed this argument. Moore, 789 F. Supp. at 1485.

Next, Moore claims that USDA regulations require a formal hearing before SASS withdrawal. USDA cited the following regulation to Moore in advising him his right to an informal hearing:

> Before [USDA] withdraws approval from a specifically approved stockyard based upon a failure to maintain or operate the stockyard in accordance with the standards specified in the agreement, the operator of the stockyard will be informed in writing of the reasons for the proposed withdrawal of approval and, upon request, shall be afforded an opportunity for a hearing with respect to the merits or validity of the action to withdraw approval if there is a dispute regarding any material fact, in accordance with rules of practice which shall be adopted for the proceeding.

9 C.F.R. § 78.44(b)(2) (emphasis added). USDA interprets this regulation to permit latitude in its selection of hearing procedure for SASS withdrawal. Moore argues that section

78.44(b)(2) must be read in conjunction with 7 C.F.R. § 1.131, where USDA guarantees a formal hearing under specific circumstances.[2] Proceedings to withdraw SASS are conspicuously absent from the detailed list in section 1.131. From this fact, we know that USDA possesses a convenient means to guarantee a formal hearing, and USDA has not done so for SASS-withdrawal proceedings. In "an administrative proceeding as to which Congress has not explicitly required any given type of procedure [, an agency may interpret its own regulations] within very broad limits." City of St. Louis v. Department of Transportation, 936 F.2d 1528, 1534-35 n.1 (8th Cir. 1991). Given our understanding of section 1.131, USDA's interpretation of section 78.44 is logical and reasonable. We thus agree with the district court that section 78.44 permits the informal hearing accorded

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[2]7 C.F.R. § 1.31 states:

> (a) The [formal] rules of practice in this subpart shall be applicable to all adjudicatory proceedings under the [following] statutory provisions[:]
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> ....
>
> Act of February 2, 1903, commonly known as the Cattle Contagious Diseases Act of 1903, section 3, as amended (21 U.S.C. 122).
>
> ....
>
> (b)(2) Adjudicatory proceedings under the regulations promulgated under the Animal Quarantine and Related Laws (21 U.S.C. 111 et seq.) for the suspension or revocation of accreditation of veterinarians (9 CFR Parts 160, 161).

Moore.

Finally, Moore cites Air Transport Ass'n of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), vacated on other grounds, -- U.S. --, 111 S. Ct. 944 (1991), in support of his argument that USDA violated 5 U.S.C. § 553 by adopting informal hearing rules for his SASS withdrawal without first providing notice and an opportunity for public comment on those rules. But the Air Transport court took "no position on whether parties whose cases have reached a final determination under [procedural rules adopted without notice and comment] may now raise the procedural invalidity of the [r]ules as a ground for seeking review." Id. at 381.

USDA reached a final decision in this case after a complete hearing and before Moore raised any section 553 argument on the record. Based on our understanding of the record, we hold that Moore is not entitled to any relief even if USDA adopted informal hearing rules in contravention of section 553. As long as we "'act within the bounds of the statute [granting us authority to review an agency decision] and without intruding upon the administrative province, [we] may adjust [our] relief to the exigencies of the case in accordance with the equitable principles governing judicial action.'" Komatz Constr., Inc. v. NLRB, 458 F.2d 317, 325 (8th Cir. 1972) (quoting Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S. Ct. 301, 307 (1939)); see also United States Steel Corp. v. EPA, 649 F.2d 572, 576 (8th Cir. 1981); Air Transport, 900 F.2d at 380 (applying Ford Motor Co. outside NLRB context).

Had Moore made a record objection based on section 553 before the hearing, USDA could have considered the

merits and decided whether to continue with the hearing at that time. If we now remand for any section 553 violation, USDA will have wasted its hearing resources for a reason that USDA had no cause to consider before Moore's informal hearing, and Moore will receive a second hearing, with attendant delays, as a reward for failing to present his full case to USDA. The futility of a second hearing further convinces us that the district court properly refused to consider Moore's section 553 argument. Even if we consider the post-hearing affidavits that Moore submitted to the district court,[3] the record contains nothing to refute the sanitation and identification violations found by USDA. Under these circumstances, the district court did not err in refusing to grant relief based on Moore's section 553 claim.

B. SECOND CHANCE

With exceptions that do not apply here, the APA requires agencies to provide regulated entities with notice and an opportunity to achieve compliance with regulations before withdrawing or suspending any license. 5 U.S.C. § 558(c). Assuming arguendo that SASS and the Agreement together constitute a license within the scope of section 558(c), we consider whether USDA complied with this law before instituting proceedings to withdraw SASS from JRS.

Section 558(c) first requires "notice by the agency in writing of the facts or conduct which may warrant the action." On October 13, 1988, Dake signed a report stating that the stockyard did not meet USDA sanitation standards and the

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[3]Cf. Moore, 789 F. Supp. at 1486 (refusing to consider additional evidence).

class B cattle were wrongly identified as class A animals. In Dake's affidavit, he asserts that he discussed this report with McDowell, a JRS manager. Nothing in the record contradicts Dake on this point. Thus, JRS received sufficient notice of violations under section 558(c)(1) before USDA conducted its May 1989 inspection.

Moore argues that USDA did not comply with the second requirement of section 559(c), that agencies provide an "opportunity to demonstrate or achieve compliance" before withdrawing or suspending SASS. USDA officials inspected the stockyard on both October 13, 1988 and May 18, 1989, and on both occasions they found substandard sanitation and class B cattle identified as class A animals. We agree with the district court that these undisputed facts are determinative of USDA's compliance with section 558 (c)(2). See Moore, 789 F. Supp at 1485.

Moore contends that affidavits of several individuals established that Moore continuously improved sanitation at the stockyard from the time JRS purchased it in 1986 to October 1989, when a USDA inspector found that the stockyard complied with USDA sanitation regulations. The district court so found, and the record supports this finding. See Id. at 1488. Moore also argues that a Missouri inspector's affidavit establishes that the stockyards were sanitary shortly after that inspector filed the adverse USDA report of October 13, 1988. But these facts do not abrogate the significance of findings by both the district court and USDA that the stockyard did not meet USDA sanitation requirements on October 13, 1988 or May 18, 1989. That USDA found the same violation on two consecutive inspection reports means that USDA complied with the

second-chance requirement of section 558(c), at least as to sanitation.

As for the identification violations, Moore argues that he availed himself of his "opportunity to demonstrate or achieve compliance" with USDA identification regulations under section 558 (c)(2), and therefore should suffer no license suspension. Moore explains that, after receiving the October 1988 inspection report, his commission company did not commit further identification violations. USDA's evidence at the informal hearing established that class B cattle were sold as class A animals at the stockyard on two occasions between the October 1988 inspection report and the May 1989. JLCC did not broker the sales on either occasion, but both the district court and USDA still held Moor responsible for the post-October 1988 identification violations.

The Agreement's language support the decisions of the district court and USDA. Moore "agree[d] to maintain and operate [the stockyard] in accordance with each of the [Agreement's] provisions ...." One of these provisions is that [i]dentity of cattle from class B states or areas shall be maintained ...." Moreover, the Agreement stipulates that Moore "shall be the individual legally responsible for the day-to-day operations of the specifically approved stockyard." See 9 C.F.R. §§ 78.44(a) n.6 & 78.44(c).

Moore implies that he did all he could to control misidentification after the adverse October 1988 inspection report by posting a sign that read, "Joplin Regional Stockyards must absolutely have complete accurate address

of owner."[4] But, especially after receiving notice in October 1988 that cattle had been misidentified and that this was a serious problem, Moore could (and should) have done more than post a sign. Tags on the ears and backs of cattle can indicate where the animal has been vaccinated or sold, and Moore could have hired someone at the commission companies' expense to compare the states indicated on these tags with the state-of-origin represented by the cattle sellers. This employee could ask further questions of the sellers if an animal's tags did not match the domicile state claimed by the seller. Besides instituting its own identification-assurance program, Moore could have evicted the independent commission companies or threatened them with disciplinary action if they sold class B cattle as class A animals. The agreement that each commission company executed with Moore gave Moore exactly this authority.

We agree with the district court and USDA that, after being warned in October 1988 that identification-assurance procedures were ineffective at the stockyard, Moore failed to correct the problems before a second adverse inspection report in May 1989. USDA complied with section 558(c).

C. EVIDENCE OF PENALTY PROPRIETY

Moore argues that USDA failed to advise him of the penalty that it sought against him and failed to adduce evidence that supports even the six-month SASS suspension

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[4]Misidentification can easily occur if cattle owners bring their animals to the stockyard and either fail to indicate the state from which they arrive or provide false address information to the commission companies.

countenanced by the district court. Moore would have USDA inform stockyard operators before any hearing of the length of any SASS suspension sought, and present evidence to justify any suspension. This evidence presumably would indicate the size of suspect stockyards, the effect of SASS suspension on communities that use suspect stockyards, and any aggravating or mitigating circumstances.

But Moore presents no authority that requires evidence of penalty propriety in this case.[5] Section 78.44

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[5]Moore cites Capital Produce Co. v. United States, 930 F.2d 1077, 1080-81 (4th Cir. 1991) (substantial record evidence did not support a willfulness finding, which was a necessary element of a violation of the Perishable Agricultural Commodities Act), Ferguson v. USDA, 911 F.2d 1273, 1277-79 (8th Cir. 1990) (precedent establishes that willfulness is relevant to sanction severity under 7 U.S.C. § 204), Hutto Stockyard, Inc. v. USDA, 903 F.2d 299, 304-05 (4th Cir. 1990) (suspension disallowed because USDA failed to comply with either the notice or the willfulness requirements of 5 U.S.C. § 558(c) before instituting license-removal proceedings), Western States Cattle Co. v. USDA, 9880 F.2d 88, 91 (8th Cir. 1989) (following Farrow), Farrow v. USDA, 760 F.2d 211, 216 8th Cir. 1985) (when USDA requires a showing that a "violation [is] flagrant and serious" before the imposition of "severe" sanctions, severe sanctions will not be allowed absent evidence of a flagrant and serious violation), and Bosma v. USDA, 754 F.2d 804,810 (9th Cir. 1984) (enforcing 7 U.S.C. § 213(b), which requires consideration of specific factors in penalty determination). The court in each of these cases simply refused to sustain a sanction when a statute, agency decision, or precedent required proof of a certain element before the sanction could

simply states that USDA may withdraw SASS upon finding that a stockyard operator has breached a section 78.44 agreement with USDA. Suspension is a lesser penalty than withdrawal; only withdrawal can connote permanence. USDA advised Moore several times before testimony began in the informal hearing that it sought to "withdraw" SASS from JRS. This was notice enough, and under section 78.44 as read in conjunction with section 558(c), USDA could impose this penalty upon establishing repeated breaches of the Agreement.

III. CONCLUSION

Having considered all of Moore's arguments on appeal, we AFFIRM the district Court's judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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be imposed, and that proof was absent from the record. Consistent with these cases, USDA may impose the sanction specified by section 78.44 (withdraw SASS) upon establishing the elements specified by section 78.44 (breach of the Agreement).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Jackie Moore, individually and as the operator of Joplin Regional Stockyards, et al.,	)	
Plaintiffs,	)	
v.	)	No. 91-0029-CV-W-2
Edward Madigan, Secretary of the United States Department of Agriculture, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This case is an appeal from an administrative agency decision before the Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA). Plaintiff seeks to enjoin the USDA decision to withdraw plaintiff's status as a "specifically approved stockyard" for a period of five years pursuant to Title 9, Code of Federal Regulations § 78.44 (1991). Pending before this Court are cross-motions for summary judgment.[1]

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[1]Defendant has also filed a motion to suspend Local Rule

Jurisdiction for this case is proper under 28 U.S.C. § 1331.

I. THE FACTS

In 1903, Congress enacted the Cattle Contagious Diseases Act for the purpose of preventing the introduction and dissemination of contagious diseases during the transportation of livestock. The Act was codified in 21 U.S.C. §§ 101-105, 111-113, and 120-128 (1972 & Supp. 1991). Pursuant to 21 U.S.C. § 111, Congress gave the Secretary of Agriculture authority to make regulations and take measures which effectuate the purpose of the Act. Pursuant to this authority, the Secretary promulgated 9 C.F.R. § 78.44 (1991), which designates and controls the operation of "specifically approved stockyards."

A "specifically approved stockyard" is defined as the "premises where cattle or bison are assembled for sale or sale purposes and which meet the standards set forth in 78.44 and are approved by the Deputy Administrator." 9 C.F.R. §78.1 (1991). In order to obtain the status of as a "specifically approved stockyard," the operator of the stockyard must execute an "agreement" set forth in either 9 C.F.R. § 78,44(c) or (d), and the operator must maintain and operate the stockyard in accordance with the standards specified in the agreement. 9 C.F.R. § 78.44(a).[2] Consequently, if the

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15 and a motion to strike. These Motions will be addressed at the conclusion of this memorandum opinion.

[2]9 C.F.R. § 78.44(a) provides:

To qualify for approval by the Deputy Administrator as a specifically approved stockyard and to retain such designation, the operator of the stockyard shall execute one

operator violates the terms of the agreement, the Deputy Administrator is given the authority to withdraw the status as a "specifically approved stockyard" upon written notice of the violations. 9 C.F.R. § 78.44(b)(2).[3] The regulation further provides that upon request the operator will be afforded an "opportunity for a hearing," and that the hearing will be conducted "in accordance with the rules of practice which shall be adopted for the proceeding." 9 C.F.R. § 78.44(b)(2).

Plaintiff Jackie Moore is the operator of the Joplin Regional Stockyards located in Joplin, Mo. The Stockyard qualified for operation as a "specifically approved stockyard" on April 13, 1987. On October 13, 1988 and May 18, 1989, inspections were conducted by the USDA at the Stockyard.

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of the agreements set forth in paragraphs (c) or (d) of this section and the stockyard shall be maintained and operated in accordance with the standards specified in the agreement.

[3]9 C.F.R. § 78.44(b)(2) provides:

The Deputy Administrator may withdraw the approval of any specifically approved stockyard when the Deputy Administrator determines that the stockyard is not maintained and operated in accordance with the standards specified in the agreement. Before the Deputy Administrator withdraws approval from a specifically approved stockyard . . ., the operator of the stockyard will be informed in writing of the reasons for the proposed withdrawal of approval and, upon request, shall be afforded an opportunity for a hearing with respect to the merits or validity of the action to withdraw approval if there is a dispute regarding any material fact, in accordance with rules of practice which shall be adopted for the proceeding.

In both inspection reports, the Stockyard was found to be in violation of the terms of the agreement. Specifically, the reports indicated that plaintiff failed to maintain the identity of cattle that were sold in the Stockyard, and that the Stockyard was not maintained in a sanitary condition.

On September 15, 1989, the USDA sent plaintiff a written notice indicating that the "specifically approved stockyard" status would be withdrawn. Plaintiff received a copy of the rules of practice which were adopted for the proceedings. The adopted rules of practice provided for an informal hearing. On June 25 and 26, 1990, the informal hearing was held before Frank Tang, a hearing officer and employee of the USDA. On November 7, 1990, Mr. Tang issued Findings of Fact and Conclusions which indicated that plaintiff was in violation of the terms of the agreement. Based upon these findings, the Deputy Administrator issued an order on December 10, 1990 withdrawing plaintiff's "specifically approved stockyard" status for a period of five years.

Plaintiff filed the present action seeking to enjoin the USDA's decision to withdraw plaintiff's "specifically approved stockyard" status. Pending before this court is plaintiff's motion for summary judgment, defendant's cross-motion for summary judgment, defendant's motion to suspend local rule 15, and defendant's motion to strike. the court will address the cross-motions for summary judgment first.

II. DISCUSSION

According to Rule 56(c), Fed. R. Civ. P., summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears this burden of proof. Aetna Life Insurance Co. v. Great National Corp., 818 F.2d 19, 20 (8th Cir. 1987). If the moving party meets the initial burden, then the nonmoving party is required to go beyond the pleadings, etc. and designate specific facts showing there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In reviewing the motion for summary judgment, the court must view the facts in the light most favorable to the adverse party and allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); U.S. v. Conservation Chemical Co., 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

A. Informal v. Formal Hearing Procedures

1. 9 C.F.R. § 78.44 and 7 C.F.R. § 1.131

Plaintiff filed the motion for summary judgment on the central issue that the USDA erred in adopting informal hearing procedures under 9 C.F.R. § 78,44, instead of the uniform rules of practice for formal adjudicatory proceedings set forth 7 C.F.R. § 1.131 et seq. (1991).[4] Plaintiff claims that the USDA was required by 7 C.F.R. § 1.131 to apply the uniform rules of practice. Plaintiff argues that the USDA's

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[4]The Uniform Rules of Practice were promulgated by the Department of Agriculture for use in formal adjudicatory proceedings instituted by the Secretary under various statutory provisions listed in 7 C.F.R. § 1.131(a) and (b). The uniform rules of practice provide for a formal adjudicatory hearing.

failure to apply the uniform rules of practice violated case precedent, and was inconsistent with the USDA's purpose in establishing the uniform rules of practice.

By attacking the USDA's decision to adopt informal procedures for the hearing, plaintiff questions the USDA's interpretation and construction of its own regulations. Although an agency's interpretation of its governing statute is a question of law which is generally subject to de novo review, an agency's interpretation of its own regulations imposes a more stringent standard of judicial review. See City of St. Louis v. Dept. of Transportation, 936 F.2d 1528, 1534 n.1 (8th Cir. 1991) (greater deference is given to an agency's interpretation of its own rules than of an agency's interpretation of its governing statutes); Jones v. Federal Deposit Insurance Corp., 748 F.2d 1400, 1405 (10th Cir. 1984) (court must give deference to the construction of a regulation by the agency that is charged with administering the regulation). In the Supreme Court decision of Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945), the Court stated that:

> [w]hen a court is called upon to construe administrative regulations the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Upon review of the language in 9 C.F.R. § 78.44 and 7 C.F.R. § 1.131, the Court does not find that the USDA's construction of these regulations is plainly erroneous or inconsistent. title 7, C.F.R. § 1.131 states that:

(a) The rules of practice in this subpart shall

> be applicable to all adjudicatory proceedings under the statutory provisions listed below as those provisions have been or may be amended from time to time. . .
>
> * * *
>
> Act of February 2, 1903, commonly known as the Cattle Contagious Diseases Act of 1903, section 3, as amended (21 U.S.C. 122).
>
> * * *
>
> (b) Adjudicatory proceedings under the regulations promulgated under the Animal Quarantine and Related Laws (21 U.S.C. 111 et seq.) for the suspension or revocation of accreditation of veterinarians (9 CFR Parts 160, 161).

Plaintiff contends that because this case was brought under the Cattle Contagious Diseases Act, 21 U.S.C. § 111, defendant was required by 7 C.F.R. § 1.131 to apply the uniform rules of practice. Although 7 C.F.R. § 1.131 refers to two sections of the Cattle Contagious Diseases Act, neither of these sections were applicable to the present case. The USDA specifically limited the applicability of the uniform rules of practice to only those proceedings under the Cattle Contagious Diseases Act which impose criminal or civil penalties, or involve veterinarian accreditation. The proceeding to revoke a stockyard's "specifically approved stockyard" status dos not fall within any of those categories.

Furthermore, the USDA's decision not to apply the uniform rules of practice in this case is not inconsistent with the language in 9 C.F.R. § 78.44. Section 78.44 (b) (2) expressly states that the agency may adopt their own

procedures to be followed in proceedings to withdraw a "specifically approved stockyard" status. It is clear that this language does not require the agency to apply the uniform rules of practice.

Plaintiff attempts to uncover an inconsistent practice by the USDA by citing several different USDA administrative adjudications which were brought under 21 U.S.C. § 111, and which apparently applied the uniform rules of practice in 7 C.F.R. § 1.131.[5] However, these cases do not offer proof of irregularity in the USDA's decision-making. None of the cases cited specifically involve the regulation at issue in this case, 9 C.F.R. § 78.44. More importantly, the USDA imposed civil penalties in those cases presumably under 21 U.S.C. § 122, which requires the application of the uniform rules of practice under 7 C.F.R. § 1.131.

This court does not find that the USDA violated case precedent or acted incongruently with its own purpose and intent in establishing uniform rules of practice. To impose plaintiff's interpretation on the regulations would be inconsistent with the plain language of 9 C.F.R. § 78.44 and 7 C.F.R. § 1.131. Therefore,the Court finds that the USDA's adoption of informal rules of practice in this case is neither

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[5]Plaintiff also cites the decision In Re Harris, No. 91-27 (May 1, 1991), where the Judicial Officer of the USDA stated that the uniform rules of practice were applicable to all USDA adjudicatory proceedings subject to the APA. However, the Harris decision does not mandate the use of the uniform rules of practice in this case because this adjudicatory proceeding is not governed by the formal hearing procedures under the APA.

plainly erroneous or inconsistent with the USDA's regulations.

2. Administrative Procedure Act, 5 U.S.C. § 554(a)

Plaintiff also argues that the USDA action was inconsistent with congressional intent to provide formal adjudicatory procedures in proceedings where a penalty is assessed by an agency. Plaintiff cites several sections of the United States Code where Congress required formal hearing "on the record" for different administrative actions involving the imposition of sanctions.[6]

Generally, in order to be entitled to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554(a), the relevant statute or regulation must provide for a hearing "on the record." Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 385 (8th Cir. 1966). In this case, it is clear that Congress did not require a formal hearing under the governing statute in this case. There is no language in 21 U.S.C. § 111 which states that there must be a hearing "on the record." Additionally, there is no evidence in the legislative history of 21 U.S.C. § 111 that Congress intended to provide a formal adjudicatory hearing under these circumstances. City of West Chicago, Ill. v. U.S. Nuclear Regulatory Commissioner, 701 F.2d 632 (7th Cir. 1983). Although congress requires formal proceedings when criminal or civil monetary penalties are assessed under 21 U.S.C. § 122, this statute is not applicable because neither criminal or civil monetary penalties were instituted by the USDA in this case.

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[6]See, e.g., 21 U.S.C. § 104, 21 U.S.C. § 117(b), 21 U.S.C. § 122, 21 U.S.C. § 134e and 21 U.S.C. § 135a.

3. Administrative Procedure Act, 5 U.S.C. § 558(c)

In the cross motion for summary judgment, the defendant points out that plaintiff is not entitled to a formal adjudicatory hearing under the Administrative Procedure Act, 5 U.S.C. § 558(c). Section 558(c) provides that the withdrawal of a license is lawful only upon notice to the licensee, and an "opportunity to demonstrate or achieve compliance with all lawful requirements." Defendant claims that this section does not provide an independent right to a full adjudicatory hearing before a license is revoked. See Gallagher & Ascher Co. v. Simon, 687 F.2d 1067 (7th Cir. 1982). Defendant states that § 558(c) only requires that plaintiff be given the opportunity to achieve compliance with the regulations.

In response, plaintiff contends that "inherent" in § 558(c) is the idea that a license cannot be suspended once the licensee brings itself into compliance with the regulations. Plaintiff has cited no authority for this proposition. The question is not whether plaintiff eventually complied with the regulations, but whether plaintiff was given the "opportunity" to comply with the regulations. In this case, plaintiff received notice on October 13, 1988 and May 18, 1989 that the Stockyard was not in compliance with the USDA regulations. From the time of the initial notice on October 13, 1988, plaintiff was given approximately seven months to cure the stated violations. The court finds that this was sufficient "opportunity" under § 558(c).

B. Notice and Comment Under the APA, 5 U.S.C. § 553

In addition to the above arguments,plaintiff also contends that the USDA violated the Administrative Procedure Act, 5 U.S.C. § 553 by adopting the informal rules

of practice without notice and comment. Although plaintiff presents a compelling argument based upon the decision in Air Transport Association of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir.), vacated on other grounds, __ U.S. __, 111 S.CT. 944 (1991), the Court will not review this issue because plaintiff did not raise it during the administrative proceedings.

In Arp v. Railroad Retirement Board, 850 F.2d 466, 467 (8th Cir. 1988), the Eighth Circuit flatly rejected review of a procedural due process claim which "grew out" of a similar claim raised before the administrative agency). As in the Arp decision, plaintiff raises an issue which could have been presented to the agency and addressed during the administrative proceedings. As a consequence,this Court will not review this claim.

C. Authority to Suspend Operations

Plaintiff's only challenge to the USDA's authority to suspend the "specifically approved stockyard" status is that the suspension is contrary to the language in regulation 9 C.F.R. § 71.4(a) (1991).[7] Section 71.4(a) provides that

> Yards,pens, chutes, alleys and other facilities and premises which are used in connection with the interstate movement of livestock or poultry shall be maintained by the person in possession of the facilities and premises in a

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[7]Plaintiff does not challenge the USDA's authority under 21 U.S.C. § 111 to create and/or suspend the "specifically approved stockyard" status. Consequently, the court will not address this issue in the present order.

> clean and sanitary condition . . . When [the State inspector] determines that such facilities or premises are not in such clean and sanitary condition and gives written notice of his determination to such person, the facilities and premises shall be cleaned and disinfected. . . before such premises are again used for livestock or poultry.

Plaintiff claims that this regulation only allows the USDA to suspend the operations of the stockyard until the premises are cleaned. Once the stockyard is clean and sanitary, plaintiff argues that the stockyard must be able to resume its operations.

The court disagrees with plaintiff's assertion. The USDA's decision to suspend plaintiff's "specifically approved stockyard" status under 9 C.F.R. § 78.44 was neither plainly erroneous or inconsistent with regulation 9 C.F.R. § 71.4(a). See Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945). Section 71.4(a) does not require that a stockyard be reopened after the premises is cleaned and sanitized. The regulation only states that the stockyard must be clean "before" it can be used for livestock or poultry.

D. The Administrative Record

Plaintiff claims that summary judgment in favor of defendant is improper in this case because there remains genuine issues of material fact. Specifically, plaintiff states that the affidavit of Dr. Dake,one of the stockyard inspectors, reveals that he disagreed with some of the findings in the inspecting report.

The court will not consider this affidavit because it was not submitted during the agency proceedings, and is not

properly part of the administrative record on appeal. On review, the district court is not permitted to consider evidence which was not part of the administrative record unless plaintiff can show bad faith or improper behavior. Maxey v. Kadrovach, 890 F.2d 73 (8th Cir. 1989), cert. denied, 495 U.S. 933 (1990). Supplementation of the administrative record is not permissible in this case because plaintiff has made no showing that the USDA acted improperly or in bad faith.

E. Review of the USDA Decision

Plaintiff requests that this Court conduct a de novo review of the USDA decision because the decision was unwarranted by the facts, and because the USDA fact-finding procedures were inadequate. See 5 U.S.C. § 706(2)(F).[8] Defendant disagrees with plaintiff's assertion and argues that the agency decision can only be set aside if it is arbitrary or capricious or an abuse of discretion under 5 U.S.C. § 706(2)(A).

Generally, de novo review of an agency decision is appropriate under the Administrative Procedure Act when the action is adjudicatory in nature and the agency's fact-finding procedures were inadequate, or new issues are raised

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[8]In reviewing this claim the Court notes that plaintiff merely lists the alleged procedural deficiencies, and fails to provide any legal argument why it was entitled to more or different procedure. Interestingly, plaintiff dos not raise the issue of whether the procedure provided by the USDA was sufficient under the 5th Amendment guarantee of procedural due process. Since plaintiff did not present the argument in this case, the Court will not review the law on this issue.

in a proceeding to enforce nonadjudicatory agency actions. Camp c. Pitts, 411 U.S. 138, 142 (1973); Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976,982 n.5 (9th Cir. 1985). Additionally, before the agency decision can be set aside, the Court must take account of whether the agency action resulted in prejudicial error. See Panhandle Co-op. Ass'n, Bridgeport, Neb. v. E.P.A., 771 F.2d 1149 (8th Cir. 1985). Plaintiff claims that the USDA utilized inadequate fact-finding procedures because, inter alia, the case was assigned to a hearing officer instead of an administrative law judge, there was no right to use subpoenas, and defendant did not submit evidence on the impact of the sanction.[9]

Upon review of the record, the Court does not believe that the fact-finding procedures were so inadequate as to require a de novo review of the USDA decision. Plaintiff implies that the hearing officer was not an impartial decision-maker because he was employee of the USDA. Generally, there is a presumption of honesty and integrity by an agency decision-maker, and the party claiming otherwise has the burden of proof. Hadges v Corbisiero, 760 F. Supp. 388, 391 (S.D.N.Y. 1991) In this case, plaintiff offers nothing more than mere speculation that the hearing officer was biased in

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[9]Plaintiff also cited several other instances of inadequate procedure claiming that he did not have possession of his own records at the time of the hearing, and that inadequate copies of documents were admitted into evidence. The court will not consider these claims because plaintiff does not provide sufficient evidence to show that these incidents affected the fact-finding procedure.

favor of the USDA.

Second, plaintiff fails to prove that the denial of subpoena power prejudiced it's right to adequate hearing procedures in this case. Plaintiff indicates that the lack of subpoena power hindered the right to conduct full discovery and to cross-examine the stockyard inspectors who completed the inspection reports. As evidence of prejudice, however, plaintiff points only to the inability to subpoena Dr. James Badger, and admits that Dr. Badger's testimony was gained through discovery in a pending state proceeding. Plaintiff's complaint that he was unable to cross-examine the stockyard inspectors is discounted by the fact that there is no absolute right to cross-examination in administrative proceedings. Beauchamp v. De Abadia, 779 F.2d 773 (1st Cir. 1985).

Finally, plaintiff's concern that defendant did not submit evidence on the impact of the penalty is not inadequate procedure. The assessment of a sanction is not required to be a fact-finding procedure, and the ultimate decision is within the discretion of the agency. Beall Construction Co. v. Occupational Safety and Health Review Commission, 507 F.2d 1041, 1046 (8th Cir. 1974). Plaintiff cites the case of Bosma v. USDA, 754 F.2d 804 (9th Cir. 1984) for the proposition that defendant was required to submit evidence on the proposed sanction. However, in Bosma the controlling statute specifically required the defendant to produce evidence on the impact of the penalty. There is no similar requirement imposed by statute or regulation in this case.

Since plaintiff has failed to prove any procedural deficiencies, a de novo review of the USDA decision is improper in this case. Alternatively, the court will review the

USDA decision under the standard of review for informal adjudicatory hearings, which is whether the agency action was arbitrary or capricious under 5 U.S.C. § 706(2)(A). Duke Power Co. v. U.S. Nuclear Regulatory Commission, 770 F.2d 386, 389 (4th Cir. 1985). This scope of review is narrow and the court may not substitute its judgment for that of the agency. Brotherhood of Railway and Airline Clerks v. Burlington Northern, Inc., 772 F.2d 380 (8th Cir. 1983). An agency's decision is arbitrary and capricious "only where it is not supportable on any rational basis." Id. at 381.

Based upon the record and the findings in this case, the court believes that the USDA's decision to suspend the "specifically approved stockyard" status is supported by a rational basis. The Stockyard was inspected twice by the USDA. The inspection reports revealed sanitation problems, and several incidents of failure to properly maintain the identification of livestock handled in the Stockyard. After being put on notice of the violations, the USDA found that plaintiff failed to properly and expeditiously cure the problems at the Stockyard.

Plaintiff attacks the USDA's finding that plaintiff was responsible for the violations committed by the individual livestock commission companies that operated in the Stockyard. The USDA found that plaintiff signed an agreement which states that the market operator is responsible for the day-to-day operations of the stockyard. From this agreement, the USDA found that plaintiff assumed an affirmative duty to maintain the stockyard in accordance with the provisions in the agreement. Based upon the terms of the agreement signed by plaintiff, the court agrees that the USDA had an adequate basis for finding that plaintiff was

responsible for the actions of the independent livestock commission companies.

In view of the USDA's findings in this case, the court believes that the USDA did not act arbitrarily or capriciously in suspending plaintiff's "specifically approved stockyard" status.

F. Five-year Suspension

Plaintiff argues that the USDA's decision to suspend plaintiff's "specifically approved stockyard" status for a period of five years should be set aside.[10] Plaintiff claims that it was not notified of the sanction that the USDA intended to impose, and that neither party submitted evidence on the impact of the sanction imposed.

Judicial review of an agency's decision to impose a sanction or penalty is limited to whether the agency made an allowable judgment given the facts of the case and the applicable statutes. Cox v. United States Department of Agriculture, 925 F.2d 1102 (8th Cir.), cert. denied, 112 S.Ct. 178 (1991). Generally, an agency's decision as to the sanction should not be reversed unless it is unwarranted by the law or without justification in light of the facts. Panhandle Coop Ass'n. v. EPA, 771 F.2d 1149, 1152 (8th Cir. 1985).

Although the Court agrees that plaintiff was in violation of the terms of the agreement with the USDA, the

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[10]Defendant has indicated that the action taken by the USDA was not a penalty or sanction. However, under 5 U.S.C. § 551(10(G), a sanction is defined as "taking other compulsory or restrictive action." Clearly, the effect of the USDA's decision to suspend the federally approved status was to restrict plaintiff's ability to operate the Stockyard.

Court believes that the USDA decision to impose a five-year suspension was not an allowable judgment given the facts of this case. Even though the Court acknowledges that there were various sanitation violations and problems maintaining the identity of the cattle, the Court finds it significant that plaintiff made marked improvements at the Stockyard between the first and second inspection. A comparison of the inspection reports reveals that the sanitation conditions improved after the first inspection. (Vol. III, Tr. 879-82). Importantly, the hearing officer noted that plaintiff achieved "satisfactory sanitation" by the time the Notice of withdrawal of approval was sent to plaintiff. (Vol. I, Tr. 60-61). Furthermore, the findings of fact in this case show that of the ten incidents of plaintiff's failure to maintain the identity of cattle, only two of them occurred after the date of the first inspection. (Vol. I, Tr. 12-13).

In issuing the order to withdraw the "specifically approved stockyard" status for five years, the Deputy Administrator did not provide any reason for choosing a five-year suspension. The Deputy Administrator did not note that plaintiff had improved the conditions between the first and second inspection, and that plaintiff offered evidence of compliance after the second inspection. The Court believes that these facts are relevant in assessing the penalty, and that the decision of the Deputy Administrator was unduly harsh given the facts of this case. Therefore, the Court finds that the five-year suspension of plaintiff's "specifically approved stockyard" status should be reduced to a period of six months.

G. Remaining Motions

Before disposing of this case, the Court must rule on two other motions filed by defendant. Defendant filed a

motion to suspend Local Rule 15 requiring discovery schedules. This motion will be withdrawn as moot. Defendant also filed a motion to strike portions of plaintiff reply brief which exceeded the point originally raised by plaintiff in its motion for summary judgment. Although the Court would discourage plaintiff's approach to raising issues in this manner, defendant was given the opportunity to fully respond to plaintiff's arguments. Defendant's motion is denied.

III. CONCLUSION

Based on the arguments presented by both parties and for the reasons set forth in this order, it is hereby:

ORDERED that plaintiff's motion for summary judgment be denied in part and granted in part. It is further

ORDERED that defendant's cross-motion for summary judgment be granted in part and denied in part. It is further

ORDERED that the Deputy Administrator's order withdrawing plaintiff's "specifically approved stockyard" status be reduced from a period of five years to a period of six months. It is further

ORDERED that defendant's motion to suspend Local Rule 15 be withdrawn as moot. It is further

ORDERED that defendant's motion to strike be denied. It is further

ORDERED that the above-styled case be dismissed with prejudice.

Fernando J. Gaitan, Jr.
United Sates District Judge

Dated: 3-30-92
Kansas City, Missouri

UNITED STATES DEPARTMENT OF
AGRICULTURE
BEFORE THE DEPUTY ADMINISTRATOR
ANIMAL AND PLANT HEALTH
INSPECTION SERVICE

In re:	)
	)
Joplin Missouri Regional	)
Stockyard	)
	)
Respondent	) Decision and Order

This is an administrative proceeding for the withdrawal of approval of respondent's stockyard status for violations of the regulations governing the interstate movement of cattle and the failure to maintain the stockyard in good repair, and cleaned and disinfected as required (9 C.F.R. §§ 71.1 et seq. and 78.1 et seq.,) hereinafter referred to as the regulations, in accordance with the Rules of Practice which were adopted for the purpose of the hearing.

This matter arose as a result of a Notice of Proposed Withdrawal of Approval (Notice) dated September 21, 1989, which was issued to respondent, Joplin Missouri Regional Stockyards, by Warren J. Ward, Jr., Area Veterinarian in Charge, Joplin, Missouri. The Notice of September 21, 1989, stated the basis for making the withdrawal of approval of respondent's stockyard and offered the respondent an opportunity to request a hearing with respect to the merits of validity of the withdrawal of approval of the Joplin Missouri Regional Stockyards in accordance with the Rules of Practice which were adopted for the purpose of the hearing. In

accordance with the Rules of Practice adopted for these proceedings, a hearing was requested by the respondent on October 5, 1989.

A hearing was granted by the Deputy Administrator for Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture for June 25-27, 1990 in Joplin, Missouri, because it appeared on the face of the pleadings that material allegations of fact in the Notice were in dispute.

The hearing was held before hearing Officer Frank Y. Tang, Esq., in Room 305, U.S. Court House, 302 Joplin Street, Joplin, Missouri, 64801 on June 25 and 26, 1990. Complainant was represented by Joseph P. Pembroke, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent was represented by Robert M. Cook, Esq., 2910 E. Camelback Road, Suite 150, Phoenix, Arizona, 85016 and Gerard D. Eftink, Esq., 9233 Ward Parkway, Suite 375, Kansas City, Missouri, 64114.

On November 7, 1990, complainant received Mr. Tang's recommendations and conclusions. In that filing, Mr. Tang Found:

Findings of Fact

1. Joplin Regional Stockyards is a stockyard located at Newman Avenue and Rangeline, Joplin, Missouri, 65682.
2. Respondent, at all times relevant herein, was a recipient of Federal Stockyards Approved Status (9 C.F.R. Part 78.44).
3. On 2/26/87, Mr. Jackie Moore signed an agreement acknowledging that he received, was informed and

understood failure to abide by the provisions of the agreement and Parts 71 and 78 of Title 9, Code of Federal Regulations, constituted a basis for withdrawal of respondent's Federal Stockyards Approved Status.

4. In the above signed agreement, Mr. Jackie Moore as operator of respondent, assumed individual legal responsibility for the day-to-day operation of the respondent (9 C.F.R. Part 78.44(c)(21)).

5. Livestock Market Inspection Reports dated October 13, 1988, and May 18, 1989, provided notice that Joplin Regional Stockyards were in violation of the 9 C.F.R. Parts 78.44(10) and (19); that the stockyard failed to maintain the identity of cattle and that the stockyard was not maintained in a sanitary condition (see Mr. Tang's report pp. 9-11.

6. That on or about:

   a. 4/11/88
   b. 5/12/88
   c. 8/15/88
   d. 8/25/88
   e. 9/1/88
   f. 12/22/88
   g. 6/2/88, 6/9/88, 6/16/88, 12/1/88

   Class "B" Oklahoma cattle were sold as Missouri Class "A" animals through the Joplin, Missouri Regional Stockyards (9 C.F.R. Part 78.44(c)(10)).

7. That respondent failed to maintain the stockyards in good repair, in sanitary condition, and clean and disinfected as required (9 C.F.R. 78.44(c)(19)).

8. That 12 inches of maggot-infested manure had accumulated.

9. That spraying equipment was not maintained at the stockyard and disinfection cans indicated non-use (9 C.F.R. Part 78.44(c)(18)).

10. That the stockyard failed to supply the market veterinarian with a suitable building including a bathroom, hot and cold running water and air conditioning (9 C.F.R. Part 78.44(c)(17)).

CONCLUSION

By reason of the facts contained in the Finding of Fact above, the respondent has violated the specifically approved stockyard agreement 9 C.F.R. § 78.44 and Parts 71 and 78 of Title 9, Code of Federal Regulations.

Therefore, the following Order is issued.

ORDER

It is hereby ordered that Federal specifically approved stockyard status under 9 C.F.R. 78.44 be withdrawn and denied to the respondent, the owners, officers, directors, partners, successors, affiliates and assigns, directly or through any corporate device for a period of five years from the effective date of this order. This order will become effective on the 15th day of January 1990.

Done at Washington, D.C.
this 10th day of December, 1990
Lonnie King, D.V.M.
Deputy Administrator
Veterinary Services
Animal & Plant Health Inspection Service